PP v. TENGKU ADNAN TENGKU MANSOR

FEDERAL COURT, PUTRAJAYA
NALLINI PATHMANATHAN FCJ
VERNON ONG LAM KIAT FCJ
ABDUL RAHMAN SEBLI FCJ
[CRIMINAL APPEAL NO: 05(L)-18-02-2020(W)]
17 JULY 2020

CRIMINAL PROCEDURE: *Judge – Recusal – Application for – Joint trial for persons giving and accepting bribe – Co-accused pleaded guilty – Allegation that trial judge heard and recorded facts of case involving co-accused and co-accused agreed to become prosecution witness – Whether there was 'real danger of bias' on part of trial judge in hearing case involving co-accused who had not pleaded guilty – Whether guilty plea of co-accused evidence against other accused who had not pleaded guilty – Whether trial judge ought to recuse himself*

The respondent was charged at the High Court for accepting a bribe of RM1 million from one Tan Eng Boon ('Tan'), an offence under s. 16(a)(A) of the Malaysian Anti-Corruption Commission Act 2009 ('Act'). An alternative charge, under s. 165 of the Penal Code ('PC'), was also preferred against the respondent. Tan, on the other hand, was charged for giving bribe, an offence under s. 16(b)(A) of the Act, as well as an alternative charge under s. 109 of the PC. The cases against the respondent and Tan were joined. Tan pleaded guilty to the alternative charge and was convicted. On the day of the trial, the respondent sought to recuse the trial judge on the grounds that, *inter alia*, the trial judge had heard and recorded the facts of the case involving Tan and Tan had agreed to become a prosecution witness. The High Court, in dismissing the respondent's application, held that: (i) the fact that Tan had pleaded guilty and had admitted to the facts put to him by the prosecution did not amount to evidence that was automatically admissible against the respondent. Such evidence would have to be adduced and would be subjected to cross-examination; (ii) *Yap See Teck v. PP* ('*Yap*') and *PP v. Mohd Amin* ('*Mohd Amin*'), which dealt with the same point, both determined that a judge in a joint trial was neither impartial nor biased when a co-accused who pleaded guilty and determined the proper procedure to be followed when a co-accused in a joint trial pleaded guilty; (iii) the joint trial in the instant case was not predicated on a joint liability in that they were not charged with an offence requiring common intention under s. 34 of the PC; and (iv) there was no basis for the contention that there was a 'real danger of bias' against the respondent. However, the decision was reversed by the Court of Appeal, which opined that, *inter alia*, (i) *Yap* and *Mohd Amin* were decided without the benefit of the 'real danger of bias' test, as approved by the Federal Court; (ii) the Court of Appeal was in a better position to consider the merits of an application for recusal; and (iii) there was a danger that the trial judge might be prejudiced and that danger was real. Hence, the present appeal.

Held (allowing appeal)
Per Nallini Pathmanathan FCJ delivering the judgment of the court:

(1) The effect of the decisions in *Yap* and *Mohd Amin* was that, when there is a joint trial and one co-accused pleads guilty and is then convicted and sentenced, the other accused would still receive a fair trial because all the facts pertaining to the charge would have to be adduced and proven afresh against the remaining accused person(s). The accused person(s) who did not plead guilty would be accorded a full opportunity to defend themselves *via* the subsisting criminal justice system which places primary importance on the continuing impartiality of a trial judge. If a real possibility of bias remained for the other accused, such a procedure would not have been approved and set down in respect of joint trials, a practice which is followed in the criminal courts to this day. (para 22)

(2) The Court of Appeal failed to consider that (i) the guilty plea of Tan was not evidence against the respondent. A judge is required to consider, separately and independently, the evidence against the respondent; (ii) there was no trial when Tan pleaded guilty and as such, the trial judge, when recording, made no finding on the facts that might pre-dispose him against the respondent; (iii) Tan was not a witness and therefore, at that stage, the trial judge did not have to consider nor accept him as a credible witness; and (iv) even if the case was referred to another judge, the record of the plea of guilt and the facts of the case adduced by the prosecution, and agreed to by the co-accused, would be equally available to the new judge. Therefore, any allegation of a real danger of bias was palpably unfounded in relation to the original court and the original presiding judge. (paras 22 & 30)

(3) There is a difference between a danger of real bias and a real danger of bias. So, the Court of Appeal conflated the tests somewhat, by requiring any possibility of real bias while the correct test requires a real possibility of bias. In so conflating the test, the Court of Appeal applied a very low threshold, thereby committing an error of law. The real danger of bias does not prescribe a very low threshold of bias. What it does is to apply a lower threshold than that of an apprehension of bias or likelihood of bias. However, such threshold does not automatically translate into an extremely low threshold. (paras 28 & 29)

(4) The Court of Appeal erred in concluding that any presiding judge who hears the facts of a case in the course of recording a plea of guilt on the part of a co-accused in relation to the offering of a bribe, effectively results in a non-erasable bias on the part of the presiding judge, such that he is automatically predisposed against the remaining accused. Such a conclusion was not warranted in view of the following matters: (i) a

judge is a professional who undertakes the job of determining the guilt or otherwise of an accused, such as the respondent, on the basis of evidence which has been the subject of the due process of law; (ii) a judge takes the judicial oath of office which requires adherence to the Federal Constitution; and (iii) the practice of a presiding judge continuing to hear a joint trial after one co-accused has pleaded guilty is settled in law, based on a long line of authorities that implicitly recognised and affirmed that impartiality was maintained in such a joint trial. (para 30)

(5) The Court of Appeal committed errors of law and applied the law incorrectly to the facts of this case. The decision of the Court of Appeal was reversed. The case was fixed for mention in the original High Court for continued hearing. (paras 31 & 32)

Bahasa Melayu *Headnotes*

Responden dituduh di Mahkamah Tinggi kerana menerima rasuah berjumlah RM1 juta daripada seorang bernama Tan Eng Boon ('Tan'), satu kesalahan bawah s. 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia ('Akta'). Responden juga dituduh dengan pertuduhan alternatif iaitu bawah s. 165 Kanun Keseksaan ('KK'). Tan, sebaliknya, dituduh memberi rasuah, satu kesalahan bawah s. 16(b)(A) Akta dan juga pertuduhan alternatif bawah s. 109 Akta. Kedua-dua kes terhadap responden dan Tan digabungkan. Tan mengaku bersalah atas pertuduhan alternatif dan disabitkan. Pada hari perbicaraan, responden memohon penarikan diri hakim bicara atas alasan, antara lain, hakim bicara telah mendengar dan merekodkan fakta kes melibatkan Tan dan Tan bersetuju menjadi saksi pendakwaan. Mahkamah Tinggi, menolak permohonan responden, memutuskan: (i) fakta Tan mengaku bersalah dan mengakui fakta-fakta yang diajukan padanya tidak terangkum sebagai keterangan terhadap responden yang automatik diterima. Keterangan sedemikian harus dikemukakan dan tertakluk pada pemeriksaan balas; (ii) kedua-dua kes *Yap See Teck v. PP* ('*Yap*') dan *PP v. Mohd Amin* ('*Mohd Amin*'), yang menangani hujahan yang sama, memutuskan bahawa seorang hakim dalam perbicaraan bersama tidak berat sebelah mahupun berkecenderungan apabila seorang tertuduh bersama mengaku bersalah dan menentukan tatacara wajar yang harus dituruti apabila seorang tertuduh bersama dalam perbicaraan bersama mengaku bersalah; (iii) perbicaraan bersama dalam kes ini bukan berdasarkan liabiliti bersama kerana mereka tidak dituduh dengan kesalahan yang mengkehendaki niat bersama bawah s. 34 KK; dan (iv) tiada asas untuk hujahan bahawa terdapat 'bahaya nyata berat sebelah' terhadap responden. Walau bagaimanapun, keputusan ini diakas oleh Mahkamah Rayuan, yang berpendapat, antara lain, (i) *Yap* dan *Mohd Amin* diputuskan tanpa manfaat ujian 'bahaya nyata berat sebelah', seperti yang dibenarkan oleh Mahkamah Persekutuan; (ii) Mahkamah

A Rayuan dalam kedudukan yang lebih baik untuk mempertimbangkan merit permohonan penarikan diri; dan (iii) wujud bahaya hakim bicara akan terprejudis dan bahaya tersebut nyata. Maka timbul rayuan ini.

Diputuskan (membenarkan rayuan)

Oleh Nallini Pathmanathan HMP menyampaikan penghakiman
B **mahkamah:**

(1) Kesan keputusan dalam *Yap* dan *Mohd Amin* ialah, apabila terdapat pertuduhan bersama dan seorang tertuduh bersama mengaku bersalah dan kemudian disabitkan dan dijatuhkan hukuman, tertuduh yang satu lagi masih akan menerima perbicaraan adil kerana kesemua fakta
C berkaitan pertuduhan perlu dikemukakan dan dibuktikan semula terhadap tertuduh (atau tertuduh-tertuduh) yang tinggal. Tertuduh (atau tertuduh-tertuduh) yang tidak mengaku bersalah akan diberi peluang penuh membela diri melalui sistem keadilan jenayah yang berkuat kuasa, yang menjunjung kepentingan kesaksamaan berterusan seorang
D hakim bicara. Jika satu kemungkinan berat sebelah yang nyata wujud buat seorang lagi tertuduh, tatacara sedemikian tidak akan dibenarkan dan ditetapkan dalam perbicaraan bersama, satu amalan yang hingga kini diikuti oleh mahkamah jenayah.

E **(2)** Mahkamah Rayuan gagal mempertimbangkan (i) akuan bersalah Tan bukan keterangan terhadap responden. Seorang hakim dikehendaki mempertimbangkan, secara bebas dan berasingan, keterangan terhadap responden; (ii) tiada perbicaraan ketika Tan mengaku bersalah dan oleh itu, hakim bicara, ketika merekod, tidak membuat apa-apa dapatan fakta yang boleh mempengaruhi beliau terhadap responden; (iii) Tan bukan
F saksi dan oleh itu, pada peringkat tersebut, hakim bicara tidak perlu mempertimbang atau menerimanya sebagai saksi kredibel; dan (iv) jika pun kes dirujuk pada hakim lain, rekod akuan bersalah dan fakta kes yang dikemukakan oleh pihak pendakwaan, dan disetujui oleh tertuduh bersama, sama tersedia pada hakim baharu. Oleh itu, apa-apa dakwaan
G bahaya nyata berat sebelah adalah ketara tidak berasas berkaitan mahkamah asal dan hakim bersidang yang asal.

(3) Terdapat beza antara bahaya berat sebelah yang nyata dan bahaya nyata berat sebelah. Oleh itu, Mahkamah Rayuan menggabungkan ujian-ujian ini, dengan mengkehendaki apa-apa kemungkinan berat sebelah yang
H nyata sedangkan ujian yang betul mensyaratkan kemungkinan nyata berat sebelah. Dalam menggabungkan ujian-ujian ini, Mahkamah Rayuan mengguna pakai ambang yang rendah lalu melakukan kekhilafan undang-undang. Bahaya nyata berat sebelah tidak memperuntukkan ambang berat sebelah yang sangat rendah. Yang dilakukannya ialah
I mengguna pakai ambang yang lebih rendah daripada pemahaman berat

sebelah atau kemungkinan berat sebelah. Walau bagaimanapun, ambang sedemikian tidak secara automatik bermaksud ambang yang teramat rendah.

(4) Mahkamah Rayuan terkhilaf apabila memutuskan bahawa mana-mana hakim bersidang yang mendengar fakta satu-satu kes, dalam merekodkan akuan bersalah tertuduh bersama berkaitan tawaran rasuah, mengakibatkan berat sebelah yang tidak boleh dihilangkan pada hakim bersidang, hingga beliau terpengaruh terhadap tertuduh yang tinggal. Kesimpulan sedemikian tidak wajar berdasarkan hal-hal keadaan berikut: (i) hakim ialah seorang profesional yang bertugas menentukan kebersalahan, atau sebaliknya, seseorang seperti responden, berdasarkan keterangan yang diuji dengan proses undang-undang; (ii) seorang hakim telah mengangkat sumpah kehakiman untuk memegang jawatan yang mensyaratkan pematuhan Perlembagaan Persekutuan; dan (iii) amalan hakim bersidang terus mendengar perbicaraan bersama selepas seorang tertuduh bersama mengaku bersalah adalah undang-undang tetap, berdasarkan deretan autoriti yang jelas mengiktiraf dan mengesahkan bahawa kesaksamaan terpelihara dalam perbicaraan bersama sedemikian.

(5) Mahkamah Rayuan telah melakukan kekhilafan undang-undang dan mengguna pakai undang-undang dengan salah pada fakta kes. Keputusan Mahkamah Rayuan diakas. Kes ditetapkan untuk sebutan di Mahkamah Tinggi asal untuk diteruskan dengan perbicaraan.

Case(s) referred to:

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***
Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2006] 1 CLJ 577 FC ***(refd)***
Gan Boon Aun v. PP [2016] 6 CLJ 647 FC ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***
Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara [2001] 4 CLJ 701 FC ***(refd)***
Porter v. Magill [2002] 1 All ER 465 ***(refd)***
PP v. Mohd Amin Mohd Razali & Ors [2002] 5 CLJ 281 HC ***(foll)***
Regina v. Gough [1993] AC 646 ***(refd)***
Seet Ah Ann v. PP [1950] 1 LNS 81 HC ***(refd)***
Surinder Singh Kanda v. Government of Malaya [1962] AC 322 ***(refd)***
Toh Ah Loh & Mak Thim v. Rex [1948] 1 LNS 72 HC ***(refd)***
Yap See Teck v. PP [1983] 1 CLJ 97; [1983] CLJ (Rep) 953 HC ***(foll)***

Legislation referred to:

Criminal Procedure Code, s. 172C
Federal Constitution, art. 5
Malaysian Anti-Corruption Commission Act 2009, ss. 16(a)(A), (b)(A)
Penal Code, ss. 34, 109, 165
Rules of the High Court 1980, O. 18 r. 19

A *For the appellant - Manoj Kumar, Julia Ibrahim & Lailawati Ali; DPPs*
For the respondent - Tan Hock Chuan, Satharamban, Michelle Lai, Natalie Tan & Aaron Lau; M/s Tan Hock Chuan & Co

[Editor's note: For the Court of Appeal judgment, please see Tengku Adnan Tengku Mansor v. PP [2020] 6 CLJ 47 (overruled).]

B *Reported by Najib Tamby*

JUDGMENT

Nallini Pathmanathan FCJ:

C **[1]** This is an appeal by the prosecution against the decision of the Court of Appeal reversing the High Court trial judge's decision dismissing the respondent, Tengku Adnan's application to recuse him from adjudicating in the criminal trial.

D **Factual Background**

[2] The factual background is that the respondent was charged under s. 16(a)(A) of the Malaysian Anti-Corruption Commission Act 2009 ('Act') for accepting a bribe of RM1 million from Tan Eng Boon ('Tan'). An alternative charge under s. 165 of the Penal Code was also preferred against
E him. Tan was charged under s. 16(b)(A) of the Act for giving the bribe, as well as an alternative charge under s. 109 of the Penal Code.

[3] The prosecution applied for a joint trial of the cases against the respondent and Tan. This was granted.

F **[4]** Prior to trial, Tan applied to plea bargain pursuant to s. 172C of the Criminal Procedure Code ('CPC'). Tan pleaded guilty to the alternative charge and was convicted. The prosecution indicated that they would utilise Tan's testimony in their case against the respondent.

[5] Therefore in accordance with well-settled principles and case-law
G (see *Yap See Teck v. PP* [1983] 1 CLJ 97; [1983] CLJ (Rep) 953) where a co-accused who pleads guilty is required by the prosecution as his witness, the case and the sentencing process is disposed of immediately. This is to avoid the danger that if sentencing is postponed then the co-accused may weight his evidence towards the prosecution in the hope of getting a lighter
H sentence. Accordingly, the case against Tan was recorded and he was convicted and sentenced to a fine of RM1.5 million, and in default imprisonment of one year.

[6] On the day of trial, the respondent sought to recuse the trial judge. The primary grounds relied on were that the trial judge had heard and recorded
I the facts of the case involving Tan and that Tan had agreed to become a prosecution witness. Secondly, the respondent took exception to the following statement made by the trial judge in the course of sentencing Tan:

... It cannot however be emphasised enough that corruption is a very serious crime. It undermines the social and economic development of the country and adversely affects the fabric of society.

The Decision Of The High Court

[7] The High Court dismissed the respondent's application for recusal. In summary, His Lordship held that:

(i) the fact that Tan had pleaded guilty and that Tan had admitted to the facts put to him by the prosecution did not amount to evidence that was automatically admissible against the respondent. Such evidence would have to be adduced formally and would be subject to cross-examination by counsel. There was no question of the respondent having admitted to those facts;

(ii) judges are not lay jury being professionally trained to deal with joint trials where one of the co-accused has pleaded guilty. Moreover, they take their oaths of office under the FC and cannot easily succumb to request to recuse on spurious and tenuous reasons;

(iii) *Yap See Teck v. PP* (above) and *PP v. Mohd Amin Mohd Razali & Ors* [2002] 5 CLJ 281; [2002] 5 MLJ 406 which dealt with the same point both determined that a judge in a joint trial was neither impartial nor biased when a co-accused pleaded guilty and determined the proper procedure to be followed when a co-accused in a joint trial pleaded guilty;

(iv) the joint trial in the instant case was not predicated on a joint liability in that they were not charged with an offence requiring common intention under s. 34 of the Penal Code.

[8] Accordingly, he held that there was no basis for the contention that there was a 'real danger of bias' against the respondent, which is the correct test to apply.

The Decision Of The Court Of Appeal

[9] The Court of Appeal reversed the decision of the High Court on the following grounds:

(i) *Yap See Teck v. PP* (above) was decided without the benefit of the 'real danger of bias' test as approved by the Federal Court. Neither was *PP v. Mohd Amin Mohd Razali & Ors* (above);

(ii) The Court of Appeal was in a better position to consider the merits of an application for recusal as stated by this court in *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577; [2006] 2 MLJ 293;

A (iii) There was a 'danger' that the trial judge might be prejudiced and that danger was real. This was because it was not possible for him or any presiding judge who had looked and considered the facts of the case and the documentary exhibits in support of the guilty plea to be able to "completely obliterate" this crucial fact from his mind.

B (iv) I can do no better than to quote from the judgment: "... the test here is not whether there would be real bias on his part but a danger that there be so and we must bear in mind the words of Lord Goff that the test is promulgated on the basis of a very low threshold of a possibility and not a probability of bias. ... In other words, such a possibility of bias could C not be ruled out, even though the probability could.";

(v) The *ratio* of the decision above was applicable to all tiers of the courts whereby a presiding judge should now refrain from presiding over a trial after he had accepted the plea of guilt from a co-accused.

D **Our Analysis And Decision**

[10] We have heard and considered both the oral and written submissions of learned counsel. We have given careful consideration to the judgments of the High Court and the Court of Appeal.

The Law

E

[11] It is important to reiterate at this juncture that both tiers of the courts below, with respect, correctly relied on the law in relation to bias. It is in the application of the test to the facts and circumstances of the case that both parties arrived at diametrically opposing conclusions.

F **[12]** The governing law in this country applies the test laid down in *Regina v. Gough* [1993] AC 646 and is summarily stated to be a 'real danger of bias'. The test was first adopted in *Majlis Perbandaran Pulau Pinang v. Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1 by Edgar Joseph J in a judicial review case, G reiterated in *Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701; [2002] 1 MLJ 321, the only criminal case dealing with bias in the context of a *habeas corpus* application and *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577; [2006] 2 MLJ 293, another civil matter relating to striking out under O. 18 r. 19 RHC.

H **[13]** In all these cases, the question before the court, as it is in this case is whether, having regard to the facts and circumstances, there was a real danger of bias on the part of the learned trial judge when he heard the case involving the respondent?

I

'Real Danger of Bias'

[14] What does 'real danger of bias' mean? In explaining this Lord Goff stated *inter alia*:

> … In my opinion, if, in the circumstances of the case (as ascertained by the court) it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand.
>
> ... Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which not necessarily be available to an observer in court at the relevant time *Finally for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias*. Accordingly, having ascertained the relevant circumstances, *the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him …* (emphasis added)

[15] In *Sungai Gelugor* Edgar Joseph Jr FCJ explained that with this test, the opinion of the court substituted that of the reasonable man. Secondly, the real danger test he said, was a reasonable compromise between the 'reasonable suspicion' and 'real likelihood' of bias test meaning that the court was contemplating a lower standard than that a likelihood or probability of bias. It required a 'real possibility of bias'. It is important to comprehend that this court did not state that it was imposing a 'very low' threshold.

[16] Equally importantly the judge went on to state that this was the preferred test as it would avoid the setting aside of judgments upon "quite insubstantial grounds and the flimsiest pretexts of bias."

[17] And in *Tan Heng Chew* the Federal Court speaking through Hamid Mohamed FCJ (later CJ) held that even though *R v. Gough* had been refined in the UK in *Porter v. Magill* [2002] 1 All ER 465, this was to ensure the law was in line with European jurisprudence, which was not applicable in Malaysia. More significantly, the court held that it was incumbent upon the court to be vigilant not to allow parties to engage in 'judge-shopping' under the guise of recusal applications.

Application Of The Law To The Facts Of The Instant Case

[18] Before us, the primary question is whether the Court of Appeal applied the correct law to the facts correctly so as to arrive at a properly reasoned and correct decision. That requires an examination and analysis of the reasoning of the judgment of the Court of Appeal.

A *First Ground Put Forward By The Court Of Appeal*

[19] At the outset, the first reason put forward by the Court of Appeal for deciding that recusal was warranted is that the High Court Judge had relied on *Yap See Teck v. PP* and *PP v. Mohd Amin Mohd Razali* where the 'real danger of bias' test was not applied.

B

[20] The court was effectively stating that without the *R v. Gough* test, which was only introduced to this jurisdiction in 1993 in *Sungai Gelugor*, the courts of Malaysia had for decades prior to the case, not dealt with the issue of bias or impartiality correctly or at all.

C **[21]** Can it be said that criminal and civil hearings and trials where recusal was sought prior to *Sungai Gelugor*, the courts had dealt with those cases improperly or without ensuring partiality?

[22] The further implication of such reasoning is that *Yap See Teck* is incorrectly determined, and *Mohd Amin Mohd Razali* was decided *per* D *incuriam*, as it is a 2002 case and *Sungai Gelugor* was not referred to. This to my mind, with respect, is an erroneous proposition of law for the following reasons:

(i) *Yap See Teck* which dealt a joint trial where the accused persons were E charged with jointly committed gang robbery, dealt directly with the issue of how a trial judge is to proceed when one co-accused pleads guilty and the other/s do not. It is on all fours with the present case. In *Yap See Teck* Azmi J (later FCJ) one of our foremost judges, relied on *Toh Ah Loh & Mak Thim v. Rex* [1948] 1 LNS 72 and *Seet Ah Ann v. PP* [1950] 1 LNS 81 following the practice in the criminal courts in F England and citing Abott J. Most pertinently, it was held that the fact that the President had recorded the facts of the prosecution case when convicting one accused, would not be prejudicial to the other accused on trial, as the fact of such a guilty plea having been taken and the record of conviction would be equally available to any other judge as much as G that presiding judge. In other words, any other judge would be similarly circumstanced, as the fact of the co-accused having pleaded guilty and the record of his consent to the facts relied upon by the prosecution, would be available to that judge too.

In *Mohd Amin bin Mohd Razali* the same reasoning was adopted by the H learned Zulkifli J (later CJM). The Court of Appeal, with respect, did not consider this salient point in determining that these two cases were inapplicable.

I

(ii) The effect of the decision in *Yap See Teck* and *Mohd Amin bin Mohd Razali* is that when there is a joint trial and one co-accused pleads guilty and is then convicted and sentenced, the other accused would still receive a fair trial because all the facts pertaining to the charge would have to be adduced and proven afresh against the remaining accused person/s.

The accused person/s who did not plead guilty would be accorded a full opportunity to defend themselves *via* the subsisting criminal justice system, which places primary importance on the continuing impartiality of a trial judge. If a real possibility of bias remained for the other accused, such a procedure would not have been approved and set down in respect of joint trials, a practice which is followed in the criminal courts to this day.

(iii) The Court of Appeal also failed to consider that *the guilty plea of the co-accused was not evidence against the respondent. A judge is required to consider separately and independently, the evidence against the respondent.*

One such example is confessions, which are admitted at trial. A confession might have details of the involvement of co-accused, which are not admissible against the co-accused, but can be utilised against one accused. The judge will hear the details but does not recuse himself purely on the basis that he heard the confession which implicated the co-accused;

(iv) The Court of Appeal failed to appreciate that there is no trial when the accused pleads guilty. There cannot be a trial, because there is no issue that requires adjudication. As such, the trial judge when recording, makes no finding on the facts that might pre-dispose him against the remaining accused, in this case the respondent;

(v) The Court of Appeal also failed to consider that in the course of his proceedings in recording a guilty plea and being convicted and sentenced, Tan was not a witness. As such, the trial judge did not at that stage, have to consider, nor accept him, as a credible witness. Tan's credibility was not in issue before the trial judge, establishing that he made no finding against, or in favour of Tan. Therefore, there could be no question of any such predisposition for or against the respondent.

(emphasis added)

[23] To that extent, we are of the view that this ground is without merit and does not warrant the trial judge being recused.

Second Ground Put Forward By The Court Of Appeal

[24] Citing *Dato' Tan Heng Chew*'s case, the Court of Appeal relied, *inter alia*, on the sentiment expressed by the judge in that case, namely that in order to maintain the highest standard of public confidence in the Judiciary

A the judge would err on the side of recusal. It is evident from a perusal of the case that the judge was speaking with reference to the particular facts of that case.

[25] Further, with the greatest respect, the Court of Appeal does not appear to have given weight to the sentence following that, namely the cautionary
B note that each case was to be decided on its own facts and the court should be vigilant not to allow parties to do 'judge-shopping' by recusal of judges.

Third Ground Put Forward By The Court Of Appeal

[26] The other salient factors that were overlooked by the Court of Appeal
C in applying this passage *in vacuo*, as it were, are that:

(i) *Tan Heng Chew*'s case involved a situation where in the course of a striking out application under O. 18 r. 19 where only affidavit evidence is permissible, the judge at first instance made findings of fact of credibility against one of the deponents, in reasonably strong terms. It
D was because of this that both the Court of Appeal and Federal Court determined that it was best that the judge be recused. This is completely different from the present case where there has been no adjudication whatsoever as explained above;

E (ii) The Court of Appeal in applying the 'real danger of bias' test explained it thus: "… the test here **is not whether there would be a real bias on his part but a danger that there be so** and we must bear in mind the words of Lord Goff that the test is promulgated on the **basis of a very low threshold** of a possibility and not a probability of bias ... In other words, such a possibility of bias could not be ruled out, even though the
F probability could." (emphasis added)

[27] This statement discloses that the Court of Appeal applied a test of whether there was a danger of real bias on the part of the trial judge. However, the test prescribed in *R v. Gough* as adopted in this jurisdiction is
G 'a real danger of bias'.

[28] There is a difference between a danger of real bias and a real danger of bias. So the Court of Appeal conflated the tests somewhat, by requiring any possibility of real bias, while the correct test requires a real possibility of bias. In so conflating the test, the Court of Appeal applied a very low
H threshold, thereby committing an error of law.

[29] The real danger of bias does not prescribe a very low threshold of bias. What it does is to apply a lower threshold than that of an apprehension of bias or likelihood of bias, as stated by Edgar Joseph Jr J in *Sungai Gelugor*. But such a threshold does not automatically translate to an extremely low
I threshold.

Fourth Ground Put Forward By The Court Of Appeal: The Requirement To Completely Obliterate The Facts In The Presiding Judge's Mind

[30] The Court of Appeal erred in concluding that any presiding judge who hears the facts of a case in the course of recording a plea of guilt on the part of a co-accused in relation to the offering of a bribe, effectively results in a non-erasable bias on the part of the presiding judge, such that he is automatically predisposed against the remaining accused. Such a conclusion is not warranted in view of the following matters, some of which have been referred to above:

(i) A judge is a professional who undertakes the job of determining the guilt or otherwise of an accused such as the respondent, on the basis of evidence which has been the subject of the due process of law. That means he relies on evidence that has been subject to the laws of evidence and cross-examination. A judge, unlike jurors, is trained in the law so as to remain impartial despite reading facts relating to a case. This is particularly apparent in today's world where social media ensures that not only the facts of a case, but a myriad of opinions and comments, are virtually inescapable. It is therefore incorrect to assume that a mere recording or sighting of a factual matrix will create a bias against the respondent;

(ii) A judge takes the judicial oath of office, which requires adherence to the Federal Constitution. Article 5 FC which enshrines the right to life, encompasses the right to a fair trial. (see *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd & Anor* [2004] 1 CLJ 701; [2004] 2 MLJ 257 and *Gan Boon Aun v. PP* [2016] 6 CLJ 647; [2016] CLJ JT (II)). The essence of a fair trial is an impartial judge as famously stated in *Surinder Singh Kanda v. Government of Malaya* [1962] AC 322 where Lord Denning described one of the twin pillars of the laws of natural justice as comprising, *inter alia*, an impartial tribunal or judge. The laws of natural justice comprising a part of the common law are an intrinsic part of the FC. This fundamental aspect of a judge's function and independence cannot be undermined by spurious and insubstantial attempts to allege bias.

(iii) The practice of a presiding judge continuing to hear a joint trial after one co-accused has pleaded guilty is settled law in this jurisdiction, based on a long line of authorities that implicitly recognised and affirmed that impartiality was maintained in such a joint trial. The reasoning in that line of case law, in both *Yap See Teck* and *Mohd Amin Mohd Razali* ought not to be lightly disturbed, again on relatively flimsy grounds. That is why a prescribed procedure has been advocated and followed for several decades.

That procedure prescribed by case-law takes into consideration the possibility of bias and has dismissed it on cogent grounds. In short, it is implicit that the conduct of a trial in such a manner meets, and does not transgress, the fundamental requirement of impartiality in a judge. The fact that the test for bias in this country was only adopted after *Sungai Gelugor* cannot erode the jurisprudence that accommodated and ensured impartiality in the older criminal case-law. In view of such impartiality, it cannot be said that those cases did not address the test of a real possibility of bias;

(iv) Finally, the Court of Appeal failed to consider the important fact that even if the case is referred to another judge, the record of the plea of guilt and the facts of the case as adduced by the prosecution and agreed to by the co-accused would be equally available to the new judge. Therefore any allegation of a real danger of bias is palpably unfounded in relation to the original court and original presiding judge.

[31] For these reasons, I am of the considered view that the Court of Appeal committed errors of law and applied the law incorrectly to the facts of this case. This warrants intervention and reversal. The decision of the Court of Appeal is reversed.

[32] The case is fixed for mention in the original High Court for continued hearing.